

1 THE HONORABLE JUDGE JAMES L. ROBART

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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE WESTERN DISTRICT OF WASHINGTON**  
10 **AT SEATTLE**

11 TODD R., SUZANNE R., and  
12 LILLIAN R. *formerly known as Jon,*

13 Plaintiff,

14 v.

15 PREMIERA BLUE CROSS BLUE  
16 SHIELD OF ALASKA,

17 Defendants.

Case No.: 2:17-cv-01041-JLR

**DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:  
OCTOBER 12, 2018**

18 Pursuant to Federal Rule of Civil Procedure 56, Defendant Premera Blue Cross Blue Shield  
19 of Alaska ("Premera") moves for dismissal of Todd R., Suzanne R. and Jon R.'s (collectively  
20 "Plaintiffs") Complaint.

21 **I. INTRODUCTION**

22 Premera's ERISA health benefit plan (the "Plan") provides coverage only for services  
23 that are medically necessary. Plaintiffs seek coverage under the Plan for Jon R.'s ten-month  
24 stay at a residential treatment center in Utah. Premera denied coverage after two separate  
25 independent child and adolescent psychiatrists reviewed Plaintiffs' claims and concluded that  
26 long-term confinement was not medically necessary to treat Jon's condition.

27 The Court should dismiss this action as a matter of law. There is no evidence to support  
Plaintiffs' claims that the treatment at issue was medically necessary and therefore covered

1 under the terms of the Plan. Premera's appeal process relied upon an independent physician to  
2 review the coverage question. Premera's denial was ultimately affirmed by an Independent  
3 Review Organization, and Plaintiffs have not presented medical evidence to contravene the  
4 findings of the independent reviewers that the treatment was not medically necessary.

## 5 II. FACTUAL AND PROCEDURAL BACKGROUND

### 6 A. The Plan and Premera as Third-Party Administrator

7 Todd R. is a participant in a group health benefits plan, and Jon, Todd's child, is a  
8 beneficiary of the Plan. Complaint, ¶ 2. The Plan is a fully insured employee welfare benefits  
9 plan under 29 U.S.C. § 1001 *et seq.* of the Employee Retirement Income Security Act of 1974  
10 ("ERISA"). Complaint, ¶ 5. Premera is the claims administrator for the Plan. *See generally*,  
11 JR-011662 *et seq.* (Contract for Rust Flying Service Benefit Booklet).

### 12 B. Elevations Residential Treatment Center

13 Plaintiffs seek reimbursement from the Plan for residential treatment that Jon received  
14 at Elevations Residential Treatment Center ("Elevations").<sup>1</sup> Complaint, ¶ 34. Jon was  
15 admitted to residential treatment on December 31, 2013 with an initial diagnosis of post-  
16 traumatic stress disorder, persistent headaches and family stress. Complaint, ¶¶ 28-29. He was  
17 fifteen years old. *Id.*

18 Elevations describes itself as "a normalized high school in a nurturing residential  
19 treatment centers environment. We have teachers who directly teach concepts instead of  
20 students having to learn through packets or assignments." Declaration of Gwendolyn C.  
21 Payton ("Payton Decl."), Exhibit 1 (<https://www.elevationsrtc.com/>; last accessed August 3,  
22 2018). It is located in Davis County, Utah. Complaint, ¶ 6. Plaintiffs allege out-of-pocket  
23 costs in excess of \$160,000 for this treatment. Complaint, ¶ 40.

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25 <sup>1</sup> Plaintiffs' Complaint refers to the facility at which Jon received treatment as Island View  
26 Residential Treatment Center ("IVRTC"). That facility terminated its operations effective  
27 April 2014. It reopened under new management as Elevations Treatment Center in May 2014.  
Plaintiffs' coverage under the Plan did not commence until May 2014, so the relevant facility  
name for this lawsuit is Elevations, not Island View. Payton Decl., Exs. 2 & 3.

On its website, Elevations describes its program as follows:

### **Programs for Troubled Teens Defined**

Programs for troubled teens vary in focus, gender, and treatment techniques. They can be anything from wilderness therapy to intensive inpatient treatment to therapeutic boarding schools. Depending on whether a therapeutic aspect is incorporated, generally programs for troubled teens work to help teens manage their issues and learn coping strategies. The type of therapy included may vary depending on the age, gender, or diagnoses focus of the program for troubled teens.

Many programs for troubled teens focus on helping teens develop useful life skills like team-work, respect, self-awareness, accountability, and much more. The reason they focus on these types of skills is because they can transition with the teen back home and onward. When teens graduate programs for troubled teens, it doesn't mean they're suddenly "fixed," it means they've learned all they can and now they need to go apply it in the real world. After these programs for troubled teens, usually teens continue to attend regular therapeutic sessions to continue a less intensive treatment.

Ex. A. Elevations' website provides the following additional detail regarding its "troubled teens" programs:

#### **Elevations RTC is a leading program for troubled teens**

Elevations RTC is a program for troubled teens, ages 13 to 17, that struggle with behavioral, emotional, and academic issues like depression, anxiety, trauma, learning disorders, and others. Through the use of many different types of therapy, Elevations strives to give each individual student the best care available. Some aspects that set Elevations apart from other programs.

**A Traditional School Environment Mixed with Residential Treatment.** Unlike many programs for troubled teens, Elevations RTC provides a traditional school environment within residential treatment. This allows for a smoother transition back home into normal life. With licensed teachers, a separate school building, and co-ed classes, Elevations offers each student an academic setting inside a residential treatment center.

**Peer-Culture Approach.** Elevations emphasizes peer feedback and interaction. In the real world, you son or daughter isn't going to be completely separate from the opposite gender in daily life. Our co-ed, supervised setting allows students to be comfortable in normal, real-life environments. A student's interactions with his or her peers is much different than one with his or her therapist, parent, or other adults. Elevation's peer-culture model gives students this much needed interaction between peers that isn't always offered in programs for troubled teens.

**Exciting and Fun Opportunities.** As a program for troubled teens, Elevations offers

many off-campus, adventurous opportunities that focus on experiential learning. These adventure therapy outings could be anything from camping and rock-climbing to rafting and snowboarding. This allows students to get outside of their comfort zone and accomplish something physical, which builds self-esteem.

Ex. A.

**C. Premera's Medical Policy for Residential Treatment Identifies Necessary Treatment.**

**1. Premera Covers Only Medically Necessary Services.**

The Plan excludes from coverage services that are not medically necessary. The plan language states:

**EXCLUSIONS**

**Not Medically Necessary**

This plan does not cover services that are not medically necessary, even if they are court-ordered. This rule also applies to the place where you get the services.

[JR-002379].

Medically necessary is, in turn, defined as follows:

**Medically Necessary and Medical Necessity**

Services and supplies that a doctor, exercising prudent clinical judgment, would use with a patient to prevent, evaluate, diagnose or treat an illness, injury, disease or its symptoms. These services must:

- Agree with generally accepted standards of medical practice
- Be clinically appropriate in type, frequency, extent, site and duration. They must also be considered effective for the patient's illness, injury or disease
- Not be mostly for the convenience of the patient, doctor, or other health care provider. They do not cost more than another service or series of services that are at least as likely to produce equivalent therapeutic or diagnostic results for the diagnosis or treatment of patient's illness, injury or disease.

For these purposes, "generally accepted standards of medical practice" means standards that are based on credible scientific evidence published in peer reviewed medical literature. This published evidence is recognized by the relevant medical community, physician specialty society recommendations and the views of doctors practicing in relevant clinical areas and any other relevant factors.

[JR-002382].

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2           **2.     Premera Covers Only Residential Treatment Center Services that are**  
3           **Medically Necessary as Described By Premera’s Medical Policy.**

4           Premera’s criteria for evaluating the medical necessity of residential treatment is set  
5 forth in its medical policy, “Residential Acute Behavioral Health Level of Care, Child or  
6 Adolescent” (“Medical Policy”). [JR-007137-40]. Premera licensed the Medical Policy from  
7 MCG Health, which develops evidence-based care guidelines (Milliman Care Guidelines) for  
8 use by healthcare and government organizations. *Id.*

9           In sum, the Medical Policy provides that a residential stay may be temporarily  
10 medically necessary until a patient suffering acute symptoms is stabilized and can be treated  
11 through less intense care, such as through partial hospitalization or outpatient counseling. [JR-  
12 007138]. Long-term schooling or custodial care is not medically necessary per the Medical  
13 Policy criteria and is excluded from plan coverage. *See id.*

14           Under the Medical Policy, residential care admission is appropriate for a child or  
15 adolescent exposed to one or more of the following risks: imminent danger to self; imminent  
16 danger to others; life-threatening inability to receive adequate care from caretakers; a severe  
17 disability or disorder requiring acute residential intervention; severe substance abuse disorder;  
18 or the patient requires a structured setting with continued around-the-clock behavioral care. *Id.*  
19 at [JR-007137]. The Policy then sets forth detailed and objective criteria to establish each of  
20 the above factors. *Id.* The purpose of these criteria is to determine if the symptoms reported on  
21 the medical records are severe enough to warrant the continued use of a residential treatment  
22 center level of care. *See id.*

23           **D.     Plaintiffs’ Claims for Residential Treatment Were Reviewed and Denied by**  
24           **Premera and Two Independent Reviewers.**

25           Plaintiffs submitted claims to Premera for Jon’s ongoing residential treatment at  
26 Elevations from May 1, 2014 (the effective date of the Plan) forward. Complaint, ¶¶ 28, 30-31.  
27 Premera denied Plaintiffs’ claims from May 1, 2014 through August 31, 2014 as untimely  
submitted and denied the claims from September 1, 2014 forward as not medically necessary.

1 Complaint, ¶ 31; [JR-000049-54] (“Denial Letter”). Premera advised Plaintiffs that its  
2 evaluation of the medical necessity of Jon’s residency at Elevations was based on the  
3 application of Premera’s criteria set forth in the Medical Policy and a “review of the  
4 information given to us by [the provider].” [JR-000050].

5 Premera’s Denial Letter dated November 18, 2014, explained that the information from  
6 the provider did not justify further residential treatment under the applicable treatment  
7 guidelines. [JR-000049-50]. Rather, the information from the provider showed that Jon’s  
8 mental health issues could be effectively treated at a lower level of care: “The information from  
9 your provider indicates that you can be treated at a lower level of care. The difficulties that you  
10 are still experiencing are usually safely treated at a lower level of care, such as partial  
11 hospitalization or outpatient treatment. Your health plan covers only medically necessary  
12 services.” [JR-000049-50]. “Information from your provider does not show evidence of  
13 continued high-risk behavior, immediate threat of high-risk behavior, life-threatening inability  
14 to provide self-care or to receive adequate care from caretakers, severe mental health  
15 symptoms, or need for a structured setting and continued around-the-clock care to treat a severe  
16 mental health condition that partly stabilized during inpatient care.” *Id.* “The information from  
17 your provider also does not indicate that the most intensive non-residential level of care will  
18 still be unable to control your mental health difficulties, or that you need continued treatment  
19 for a severe Substance Use Disorder in order to [treat] [sic] your mental health disorder.” *Id.*

20 On May 13, 2015, Plaintiffs appealed the denial of coverage through Premera’s internal  
21 appeal process (“Level I Appeal”). Complaint, ¶ 32; [JR-000016-47]. Plaintiffs’ Level I  
22 Appeal letter made two arguments. First, Plaintiffs argued that Premera’s Medical Policy did  
23 not comport with generally accepted standards of care and was too restrictive. *Id.* Plaintiffs  
24 cited to the American Academy of Child and Adolescent Psychiatry Practice Parameters and  
25 other medical literature on the standard of care. [JR-000020-22]. Second, Plaintiffs argued  
26 that Jon’s treatment was medically necessary. They provided a detailed chronology of Jon’s  
27

1 behavior, past treatments and medications, as well as Jon's medical records and Elevations  
2 treatment records. [JR-000016-47].

3 Plaintiffs' Level I Appeal included two letters from doctors who had treated Jon prior to  
4 his admission to Elevations. [JR-000027-31; JR-000403-05; JR-000407-408]. Neither doctor  
5 treated Jon during his time at Elevations, and neither letter made any assessment of his time  
6 there. [JR-000403-05; JR-000407-08]. Plaintiffs also highlighted several progress and therapy  
7 notes from Jon's time at Elevations. [JR-000033-34]. These notes described Jon's  
8 temperament on individual occasions as "upset," "discouraged at how far away he is from his  
9 ideal self," "anxious," "irritable," and "isolating." [JR-000033-34]. Plaintiffs argued that  
10 based on these records, resident treatment was medically necessary because Jon "continue[d] to  
11 have mood lability [sic], co-dependent behavior, anxiety, and depression" and needed to  
12 continue "working on internalizing the coping skills needed to recognize how his mental health  
13 issues are affecting every area of his life." [JR-000045].

14 In its review of the Level I Appeal, Premera included the participation of an  
15 "Independent Physician Reviewer," Dr. Williams Holmes, who is Board Certified by the  
16 American Board of Psychiatry and Neurology in Child & Adolescent Psychiatry. [JR-002410-  
17 14] and [JR-011655-60]. Dr. Holmes's opinion included a "Conflict of Interest Statement"  
18 certifying his independence and an absence of any conflict of interest on his part. *See* [JR-  
19 011658-59].

20 Dr. Holmes reviewed Plaintiffs' Level 1 Appeal submission and other relevant claim  
21 information, including the Master Treatment Plan, treatment notes and shift logs from  
22 Elevations, the Plan language, and Premera's Medical Policy titled, "Residential Acute  
23 Behavioral Health Level of Care, Child or Adolescent ORG: B-902-RES (BHG)." [JR-  
24 011655].

25 Dr. Holmes found that although "the patient continued to display chronic difficulties  
26 with mood, anxiety, oppositional behavior, and interpersonal conflict after [May 1, 2014],"  
27 "these difficulties [...] were not of a severity to warrant 24 hour treatment." [JR-011656]. Dr.

1 Holmes further observed that “at no time was there evidence of imminent risk of harm to self or  
2 others, as well as no episodes of self-harming behavior. There was no evidence of deterioration  
3 of functioning that would require the level of intensive treatment found in the residential  
4 treatment center setting.” [JR-011656]. A Premera Medical Director who is Board Certified in  
5 Public Health and General Medicine reviewed Dr. Holmes’s expert opinion. [JR-002410].

6 Premera denied Plaintiffs’ Level 1 Appeal on June 16, 2015. [JR-002410-13] (“Level I  
7 Appeal Decision”). Premera affirmed its prior assessment that residential treatment was not  
8 medically necessary. [JR-002410]. Premera reasoned that “[b]y May 1, 2014, his symptoms  
9 were not of a severity that would warrant the continued use of a residential treatment center  
10 level of care, though he continued to display chronic problems related to his mood and feelings  
11 of being ‘overwhelmed,’” those symptoms “could have been treated in a less restrictive level of  
12 care,” and residential treatment was therefore “not medically necessary” as required by the Plan  
13 language. [JR-002410].

14 On August 10, 2015, Plaintiffs requested a Level II Appeal. [JR-002428-33] (“Level II  
15 Appeal”). In their Level II Appeal, Plaintiffs argued that Premera had failed to advise Plaintiffs  
16 of the weight given to the medical records provided by them. [JR-002430]. Plaintiffs  
17 questioned whether Premera’s Level I Appeal Decision was based on a “continued stay  
18 criteria” or a “discharge criteria.” [JR-002431].

19 Plaintiffs criticized the allegedly onerous burden imposed by the Medical Policy and  
20 provided additional medical records to support their contention that residential treatment is  
21 medically necessary. [JR-002430]. Plaintiffs requested that Premera cite to specific instances  
22 in the medical records that support Premera’s denial of their claims, which they asserted was  
23 required under ERISA. [JR-002433]. Plaintiffs also challenged Premera’s determination that  
24 certain claims were not timely filed. [JR-002429-30].

25 Premera’s Level II Appeal process included a panel review of Jon’s file. The panel  
26 consisted of a physician reviewer Board-Certified in Internal Medicine, a Member Contracts  
27 Operations Manager, and a New Group and Product Implementation Manager, all three of

1 whom had experience in health plan appeals. [JR-007151]. The panel reviewed all material  
2 submitted with Plaintiffs' Level I and Level II Appeals, Dr. Holmes's findings as the  
3 Independent Physician Reviewer, the Premera Medical Policy, Jon's medical records, and the  
4 Plan language. [JR-007151].

5 On September 10, 2015, the Level II Appeal panel upheld the Level I Appeal Decision  
6 denying coverage. [JR-007151-52] ("Level II Appeal Decision"). Addressing the medical  
7 records, the Level II Denial Letter noted that "[t]he records did not include a comprehensive  
8 evaluation, but only a narrative of daily group assessments, or intermittent doctor interviews."  
9 [JR-007152]. "This information indicated the absence of a plan for self harm, or to harm  
10 others, and no evidence of severe symptoms which could not have been treated in an intensive  
11 outpatient management program." [JR-007152]. The Level II Denial reasoned that the  
12 "purpose of residential treatment admission is stabilization in the context of a short term stay"  
13 and that "the severity of illness for the [residential treatment] level of care [was] not  
14 documented in the clinical notes from the facility." [JR-007152].

15 The Level II Appeal Decision further responded to each of the concerns Plaintiffs raised  
16 in their Level II Appeal request. [JR-007151-52]. First, Premera acknowledged it had made an  
17 error in the Level I Appeal when it concluded that Plaintiffs' appeal was untimely with respect  
18 to five dates of service. [JR-007152-55]. Accordingly, Premera confirmed it had included  
19 those claims in the Level II Appeal review. [JR-007152]. Otherwise, Premera explained that  
20 its decision was based on its Medical Policy, which used the Milliman Care Guidelines, and  
21 constituted generally accepted standards of medical practice that are applied consistently to all  
22 plan members. [JR-007152]. Premera then reiterated that coverage for Jon's continued stay  
23 was denied based on a standard of medical necessity, specifically noting there was "an absence  
24 of record of severe symptoms which could not have been treated in an intensive outpatient  
25 management program." [JR-007152]. This decision was in accordance with the Plan which  
26 "does not cover services that are not medically necessary." [JR-007152].  
27

1 On December 18, 2015, Plaintiffs requested an independent review of Premera's  
2 decision. [JR-007170-72] ("IRO Request"). The independent review was randomly assigned  
3 to MCMC, one of the three IROs Premera used for fully insured claims out of Alaska. [JR-  
4 0011743]. The physician reviewer, who remained anonymous, is board certified in Psychiatry  
5 with subcertification in Child & Adolescent Psychiatry. [JR-011747]. The IRO reviewer is an  
6 attending staff psychiatrist at several northeast hospitals as well as a clinical instructor. [JR-  
7 011747]. The IRO reviewer specializes in psychiatric disorders, forensic psychiatry, and child  
8 & adolescent psychiatry. [JR-011747]. The IRO reviewer is also an author of peer-reviewed  
9 medical literature, a member of the American Academy of Child and Adolescent Psychiatry,  
10 American Psychoanalytic Association, and Academy of Occupational and Organizational  
11 Psychiatrists. [JR-011747].

12 On January 14, 2016, MCMC upheld Premera's denial of coverage for inpatient  
13 residential treatment. [JR-001745-52] ("Decision Letter"). The IRO Decision Letter  
14 concluded that the Plan should not cover the residential treatment for which Plaintiffs claimed  
15 coverage under the medical necessity standard. [JR-011746]. The Decision Letter noted that  
16 during the time period in question, Jon R. "had periods of time at home during which he was  
17 not receiving residential treatment and his clinical course continued." [JR-001751]. This  
18 demonstrates that "alternative therapies and approaches that would have been as likely to be  
19 effective during the period of time." [JR-001751].

### 20 III. ARGUMENT

#### 21 A. Plaintiffs Bear the Burden to Offer Evidence from which a Reasonable Fact Finder 22 Could Return a Decision in Their Favor.

23 Under the *de novo* standard that applies here, Plaintiffs bear the burden to establish  
24 triable issues of fact. "Section 502 of ERISA entitles a participant or beneficiary of an ERISA-  
25 regulated plan to bring a civil action 'to recover benefits due to him under the terms of his plan,  
26 to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under  
27 the terms of the plan.'" *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 724 (9th Cir. 2000)

1 (quoting 29 U.S.C. § 1132(a)(1)(B)). In reviewing a decision to deny benefits under an ERISA  
2 claim, a district court applies a de novo standard unless the plan provides to the contrary.  
3 *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 111, 128 S.Ct. 2343 (2008).

4 “When a district court reviews a plan administrator's decision to deny benefits under the  
5 *de novo* standard of review, the burden of proof is placed on the claimant to prove his  
6 entitlement to contractual benefits.” *Baxter v. MBA Grp. Ins. Tr. Health & Welfare Plan*, 958  
7 F. Supp. 2d 1223, 1227 (W.D. Wash. 2013) (citing *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d  
8 1290, 1294 (9th Cir. 2010) (citing *Horton v. Reliance Standard Life Ins. Co.*, 141 F.3d 1038,  
9 1040 (11th Cir. 1998); *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 658 (8th Cir. 1992)).  
10 The District Court may decide the case by summary judgment if there are no genuine issues of  
11 material fact in dispute. *Tremain v. Bell Indus. Inc.*, 196 F.3d 970, 978 (9th Cir. 1999); *see*  
12 *also, Baxter*, 958 F.Supp.2d 1223 (granting summary judgment for defendant on de novo  
13 review due to plaintiff's failure to raise an issue of material fact); *Muniz v. Amec. Const.*  
14 *Mgmt., Inc.*, 623 F.3d 1290 (9th Cir. 2010) (affirming lower court's grant of summary  
15 judgment for defendant in denial of long term disability claim where “the district court found  
16 that the evidence presented, including the opinions of two health care professionals [] did not  
17 confirm Muniz's claims that his symptoms rose to the level of total disability”); *Rodriguez-*  
18 *Abreu v. Chase Manhattan Bank, N.A.*, 986 F.2d 580 (1st Cir. 1993) (affirming the lower  
19 court's grant of summary judgment on de novo review in favor of defendant on its denial of  
20 benefits).

21 “The mere existence of a scintilla of evidence in support of the non-moving party's  
22 position is not sufficient.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.  
23 1995). In other words, “summary judgment should be granted where the nonmoving party fails  
24 to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor.”  
25 *Triton Energy*, 68 F.3d at 1220.

1 **B. The Undisputed Evidence Supported Denial of Plaintiffs' Claims.**

2 Here, the Court should uphold Premera's denial of the claimed benefits under *de novo*  
3 review. As discussed more fully below, the only competent medical evidence in the record  
4 supports the denial of the claims. Premera's review relied upon the input from an independent  
5 physician, the Level I and Level II appeal denials finding the claimed benefits were not  
6 medically necessary, and then affirmed by an Independent Medical Review Organization  
7 decision affirming that conclusion. Meanwhile, Jon's medical records satisfied none of the  
8 Medical Policy criteria, and Plaintiffs' claims were and still are not supported by a credible  
9 medical opinion.

10 **1. The record does not contain evidence supporting Plaintiffs' claim for coverage.**

11 Plaintiffs provide no medical opinion or diagnosis as to Jon's condition during the time  
12 in question to support their claims. The only medical evidence in the record supporting  
13 Plaintiffs' claims is as follows:

- 14 • Progress and therapy notes from Jon's time at Elevations which described Jon's  
15 temperament on individual occasions as "upset," "discouraged at how far away  
16 he is from his ideal self," "anxious," "irritable," and "isolating." [JR-000033-  
17 34].
- 18 • Two letters from doctors who had treated Jon prior to his admission to  
19 Elevations and well before the period of service at issue in this action. [JR-  
20 000027-31; JR-000403-05; JR-000407-08]. But neither doctor treated Jon  
21 during his time at Elevations, and neither letter made any assessment of his time  
22 there. [JR-000403-05; JR-000407-08].

23 The progress and therapy notes do not show that Jon's treatment at Elevations was  
24 medically necessary for the time period beginning on May 1, 2014. Premera's Medical Policy  
25 provides for residential stay that is medically necessary until a patient suffering acute  
26 symptoms is stabilized and can be treated through less intense care, such as through partial  
27 hospitalization or outpatient counseling. [JR-007138]. Long-term schooling or custodial care

1 is not medically necessary per the Medical Policy criteria, and is excluded from plan coverage.  
2 *Id.* The medical evidence offered by Plaintiffs fails to raise an issue of fact as to whether Jon's  
3 condition was at such an acute level as to require inpatient care.

4 The two letters contained in the record from providers who treated Jon prior to his  
5 admission to Elevations also fail to support that residential treatment services were necessary at  
6 the time of review. [JR-000403-05; JR-000407-08]. Dr. Shubu Ghosh, a psychiatrist, treated  
7 Jon from February 8, 2011 through July 16, 2013. [JR-000403-05]. During that period, Dr.  
8 Ghosh observed that Jon suffered from depression and anxiety and on two occasions suggested  
9 residential care. [JR-000403-05; JR-000407-08]. Nearly half of Dr. Ghosh's undated letter is a  
10 summary of Jon's behavior following the termination of Dr. Ghosh's treatment, during which  
11 time Dr. Ghosh states that Jon's parents continued to consult with him. [JR-000404-05]. It is  
12 based on those events—outside of Dr. Ghosh's treatment of Jon—that Dr. Ghosh concludes  
13 that “Jon[] needed inpatient residential level of care” and that “[h]is parents exhausted all  
14 outpatient avenues and he required intensive treatment to cope with his debilitating depression,  
15 anxiety and behavioral problems. I recommended that Jon[] be put in inpatient treatment  
16 because I was concerned for his safety.” [JR-000405]. Dr. Ghosh has not treated Jon since  
17 July of 2013, six months before he was admitted to residential treatment. His second-hand  
18 accounting of events that followed his treatment of Jon and his recommendations based on  
19 those events are not reliable medical conclusions. Dr. Ghosh had no contact with Elevations,  
20 did not review Jon's medical records from Elevations, and did not treat Jon at any point during  
21 his stay at Elevations. His letter therefore lacks foundation and relevance to the question in this  
22 case, which is whether a continued stay at Elevations after May 1, 2014 was medically  
23 necessary.

24 Mr. Sumner's letter has similar problems. Mr. Sumner, a licensed clinical social  
25 worker, treated Jon for a period of nine months from March 2013 through December 2013.  
26 [JR-000407-08]. Jon's parents' initial concerns were Jon's oppositional behavior, depression,  
27 relationship issues, and school performance. [JR-000407]. Mr. Sumner's letter, much like Dr.

1 Ghosh's, summarizes a series of oppositional behavior events. [JR-000407]. Mr. Sumner  
2 concludes that he "recommended" residential treatment because "Jon[] continued to decline."  
3 [JR-000408]. Mr. Sumner's letter also fails to offer evidence to satisfy the medical necessity  
4 requirement. Mr. Sumner had no contact with Elevations, did not review Jon's medical records  
5 from Elevations, and did not treat Jon at any point during his stay at Elevations. His opinion is  
6 not relevant as to whether it was medically necessary for Jon to continue to stay at Elevations  
7 after May 1, 2014.

8 In *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1129 (10th Cir.  
9 2011), a case closely analogous to the case at bar, the plan denied coverage for a stay at a  
10 residential treatment center because the plaintiff's symptoms were not severe enough to require  
11 residential care. See *id.* at 1134. Horizon determined that "[t]here was no reported  
12 information" that A.S. could not care for himself due to a psychiatric disorder, nor that he  
13 required round-the-clock supervision to develop basic living skills. *Id.* at 1134 (internal  
14 citations omitted). Instead, Horizon's claims administrator noted that A.S. "went home on a  
15 pass and did well with his parents." *Id.* Thus, while A.S. "met criteria for continued  
16 treatment," he met those criteria for "a less restrictive level of care" to include "several hour[s]  
17 [per] day, multiple times [per] week [of] psychiatric evaluation and treatment including  
18 counseling, education and therapeutic interventions." *Id.* The Tenth Circuit affirmed, agreeing  
19 with the district court that Horizon properly denied benefits for the residential treatment.<sup>2</sup> *Id.*

20 Here, the evidence supporting the denial of residential treatment is even stronger than in  
21 *Eugene S.* In this case, Plaintiffs' request for residential treatment was reviewed and denied by  
22 two separate, independent reviewers who were specialists in behavioral health. In contrast, the  
23 Tenth Circuit affirmed the denial of residential treatment services in *Eugene S.*, where there is  
24 no record of any independent review.

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26 <sup>2</sup> *Eugene S.* was decided based on an arbitrary and capricious standard, but the case applies  
27 here, where the facts are similar, and here the relevant facts are undisputed.

1           **2. Two Independent Child & Adolescent Psychiatrists Reviewed the Evidence in**  
2           **the Record and Concluded That It Did Not Support a Medical Necessity**  
3           **Determination.**

4           Premera’s conclusion that the treatment was not “medically necessary” was based on  
5           the opinion of an “Independent Physician Reviewer,” William Holmes, MD, a physician Board  
6           Certified by the American Board of Psychiatry and Neurology in General Psychiatry and Child  
7           & Adolescent Psychiatry. [JR-000009-14]. Subsequently, a reviewing physician Board  
8           Certified in Psychiatry with Subcertification in Child & Adolescent Psychiatry reviewed the  
9           record on behalf of an IRO and agreed. [JR-011745-52].

10          The independent reviewers involved in Jon’s appeal did not dispute his diagnoses.  
11          They both concluded, nevertheless, that in-patient treatment was not “medically necessary.”  
12          Their decisions were based on their professional experience and judgment upon review of the  
13          record provided to them.

14          Dr. Holmes acknowledged that Jon suffered from “chronic difficulties with mood,  
15          anxiety, oppositional behavior, and interpersonal conflicts” subsequent to his admission. [JR-  
16          000010]. However, he concluded, his symptoms “were not of a severity to warrant 24 hour  
17          treatment,” noting there was no “evidence of imminent risk of harm to self or others” “no  
18          episodes of self-harming behavior,” and “no evidence of deterioration of functioning” to  
19          require inpatient treatment. [JR-000010].

20          The IRO physician, after carefully reviewing and summarizing the record, similarly  
21          concluded that “withholding treatment would not have reasonably been expected to affect the  
22          patient’s health adversely.” [JR-011751]. The reviewer reasoned that “less intensive  
23          alternative approaches would have as much of a chance of improving his condition.” [JR-  
24          011751].

25          Plaintiffs offer no qualified opinion in response to the two independent medical experts  
26          upon which Premera relied. This is fatal to their claims as a matter of law. *See Krysten v. Blue*  
27          *Shield of California*, No. 15-CV-02421-RS, 2016 WL 5934709, at \*5 (N.D. Cal. Oct. 11,  
2016), *aff’d sub nom. Krysten C. v. Blue Shield of California*, 721 F. App’x 645 (9th Cir. 2018)

1 (“Blue Cross . . . rel[ied] on the opinions of the three physicians that Krysten had progressed to  
2 a point that residential treatment for her condition was no longer medically necessary. Krysten  
3 has shown she was still in need of treatment, but has pointed to nothing in the record sufficient  
4 to establish that only residential treatment would have been adequate for her medical needs.”);  
5 *Briesch v. Auto. Club of S. California*, No. 298CV405C, 2000 WL 33710862, \*6 (D. Utah Dec.  
6 20, 2000) (“Plaintiffs have not cited to any statement by a doctor, nurse, or legal expert that  
7 supports the conclusion that Briesch’s continued confinement at an acute treatment center such  
8 as Charter Hospital after November 17 was medically necessary.”).

9 Moreover, when a claim is reviewed by an independent review organization and  
10 deemed not medically necessary, that finding supports a conclusion that the denial was  
11 justified. *See Peter B. v. Premera Blue Cross*, No. C16-1904-JCC, 2017 WL 4843550 (W.D.  
12 Wash. Oct. 26, 2017) No. C16-1904-JCC, 2017 WL 4843550, at \*5 (W.D. Wash. Oct. 26,  
13 2017) (“The Court finds as follows: Premera’s coverage determinations were consistent with  
14 Plan requirements, Premera relied on the advice of an independent physician in making its final  
15 coverage decision, there is no evidence of shifting rationales, and the IRO review validated  
16 Premera’s final benefit determination.”); *Tracy O.*, 2017 WL 3437672, at \*9 (noting, in  
17 granting summary judgment in favor of the defendants, that the insurer’s “conclusions are  
18 further supported by the independent review” of the claims); *Blair v. Alcatel-Lucent Long Term*  
19 *Disability Plan*, 688 Fed. Appx. 568, 576 (10th Cir. 2017) (noting in a disability benefit case  
20 that a decision to terminate long-term disability benefits was supported by two independent  
21 reviewers concluded that the claimant was able to work); *see also Basquez v. East Cent. OK*  
22 *Elec. Co-op., Inc.*, No. 06-cv-487 (SPS), 2008 WL 906166, at \*11 (E.D. Okla. March 31, 2008)  
23 (citing *Davis v. UNUM Life Ins. Co. of Am.*, 444 F.3d 569, 575 (7th Cir. 2006)) (“[A]n  
24 administrator’s decision to seek [] independent expert advice is evidence of a thorough  
25 investigation. When an administrator ... opts to investigate a claim by obtaining an expert  
26 medical opinion—independent of its own lay opinion and that of the claimant’s doctors—the  
27 administrator is going to pay a doctor one way or another. Paying for a legitimate and valuable

1 service in order to evaluate a claim thoroughly does not create a review-altering conflict.”  
2 (internal citations and quotations omitted))<sup>3</sup>; *see also* John Bronsteen, Brendan S. Maher &  
3 Peter K. Stris, *ERISA, Agency Costs, and the Future of Health Care in the United States*, 76  
4 FORDHAM L. REV. 2324-26 (2008) (explaining that external review significantly diminishes  
5 agency risk because the agent’s discretion for opportunistic behavior is circumscribed by the  
6 determinations of an impartial reviewer).

7 The Affordable Care Act (“ACA”) recognizes the probative value of an IRO decision.  
8 The ACA mandates an IRO review process for all health plans offered in the United States,  
9 with the exception of plans grandfathered under pre-ACA rules. *See* 42 U.S.C. § 300gg-  
10 19(b); 29 C.F.R. § 2590.715-2719(c)(2)(vii)-(ix). *Group Health Plans and Health Insurance*  
11 *Issuers: Rules Relating to Internal Claims and Appeals and External Review Processes*, 76  
12 Fed. Reg. 37,208, 37,210-11 (June 24, 2011) (codified at 45 C.F.R. pt. 147) (explaining the  
13 IRO process for self-insured plans).

14 The Court should grant summary judgment in favor of Premera because the only  
15 competent, admissible medical evidence before this Court confirms that Jon R.’s residential  
16 treatment at Elevations was not medically necessary. The same is true here. Accordingly, for  
17 the foregoing reasons, there is no issue of fact to preclude summary judgment in favor of  
18 Premera and the Plan.

#### 19 IV. CONCLUSION

20 For the foregoing reasons, the Court should grant summary judgment in favor of the  
21 Defendants and dismiss this case.

22  
23 <sup>3</sup> *Briesch, Tracy O., Blair, and Basquez* were decided on a de novo standard of review. *See*  
24 *Briesch* 2000 WL 33710862 at fn. 7 (“The court reaches this decision under a de novo standard  
25 of review.”); *Tracy O.*, 2017 WL 3437672, at \*10 (“Under even a de novo standard of review,  
26 Plaintiffs have failed to show by a preponderance of the evidence that Defendants disregarded  
27 or improperly minimized information from S.O.’s treatment providers.”); *Blair*, 688 F. App’x at  
573 (“our review is de novo”); *Basquez*, 2008 WL 906166, at \*12 (“both parties agree that the  
de novo standard of review is inapplicable”). *Krysten* and *Peter B.* applied the abuse of  
discretion standard. But all these cases are instructive here, where the evidence is undisputed.

1 DATED this 14<sup>th</sup> day of September, 2018.

2  
3 Respectfully submitted,

4 KILPATRICK TOWNSEND & STOCKTON LLP  
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1 **CERTIFICATE OF SERVICE**

2 I, Gwendolyn C. Payton, hereby certify under penalty of perjury of the laws of the State  
3 of Washington that on September 14, 2018, I caused to be served a copy of the attached  
4 document to the following person(s) in the manner indicated below at the following  
5 address(es):

6 Brian S. King  
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13 ☒ **by CM/ECF**

14 ☐ **by Electronic Mail**

15 ☐ **by Facsimile Transmission**

16 ☐ **by First Class Mail**

17 ☐ **by Hand Delivery**

18 ☐ **by Overnight Delivery**

19 /s/ Gwendolyn C. Payton

20 Gwendolyn C. Payton